

Chapter 2: Legal Issues in Recruitment

Outline	2.1	Introduction	2.8	Application process
	2.2	Discrimination	2.9	Interview process
	2.3	Protected characteristics	2.10	Criminal records
	2.4	Prohibited conduct	2.11	References
	2.5	Occupational requirements	2.12	Data protection
	2.6	Enforcement and remedies	2.13	Summary
	2.7	Job advertisements		



Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the CILEx syllabus:

- 2 Understand the legal implications of recruitment
- 5 Understand the right to request flexible working, maternity and paternity leave and pay and other family-friendly policies

2.1 Introduction

The recruitment of a new employee is the first stage in the employment process and an important step in terms of employment law practice. Employers need to ensure that their human resources department is fully trained and aware of the correct procedures to be followed and the documentation to be produced. There are a number of legal issues that can arise in the recruitment process.

Discrimination is fundamental in recruitment and selection because choices have to be made as to the suitability of an applicant. Employers therefore need to be aware of the pitfalls of potential discrimination claims.

Public authorities have a legal duty to take **positive** steps to eliminate unlawful discrimination and **promote equality of opportunity**. Private employers are subject to **negative** obligations to ensure that there is no unlawful discrimination in the recruitment process, when they decide who should be offered employment and what that employment should be.

During the recruitment process an employer will request a reference for a prospective employee. Here, too, there are a number of issues which may result in claims for **negligent misstatement**, **breach of contract** or even **defamation**.

An employer will need to be aware that personal data about the applicants is likely to be retained either in a computer system or manually (in paper form). This raises the issue of **data protection**, so it is important that applicants are made aware of the data protection policy, the reason for the policy and the duration the information is to be held.

A step-by-step recruitment policy is always useful to make sure the correct procedures are followed and the right documents are used, thus ensuring that the employment relationship begins correctly.

This chapter will discuss:

- the nature, scope and effect of discrimination law on the recruitment process;
- the legal issues associated with job advertisements and the application and interview process;
- the legal and practical concerns regarding the provision of references;
- the remedies available for successful claims brought involving the recruitment process.

2.2 Discrimination

There is no general rule prohibiting discrimination. In fact, the key task for those undertaking the recruitment and selection process is to discriminate between one applicant and another. Provided the criteria used are **objective** and appropriate, considering such aspects as the applicant's qualifications and experience, there should be no issue for dispute.

There are a number of criteria that are inappropriate and are prohibited. Discrimination in these terms can be defined as the **less favourable treatment** of a person or persons because of characteristics that are not relevant to the matter in hand.

Discrimination during recruitment and employment is prohibited by the **Equality Act 2010 (EA 2010)**.

Under this legislation, a job applicant can bring a claim against a potential employer for:

- discrimination in the arrangements made for recruitment;
- discrimination by the employer in the terms of employment offered;
- discrimination as a result of a refusal or a deliberate failure to offer employment; and
- harassment.

An employer is vicariously liable in relation to the acts of its employees. This includes liability to third parties for **tortious** acts and liability for discriminatory behaviour by employees in the course of their employment unless the employer can show that it took all reasonable steps to prevent the discrimination. **Vicarious liability** is relevant in the recruitment process as the employer will be vicariously liable for the actions of staff carrying out the recruiting. It is therefore important that those responsible for recruitment are adequately trained in good recruitment practice – in particular, in relation to equal opportunities.

When answering a question on discrimination you will first need to determine whether the employee relies upon a protected characteristic. The protected characteristics and any relevant definitions are explained at **2.3–2.3.6**. If an employee does have a protected characteristic, you then need to determine the types of discrimination (prohibited conduct) that have occurred. These are explained at **2.4–2.4.7**. You will then need to consider if there is a defence and any remedies available.

2.3 Protected characteristics

There are currently nine sets of protected characteristics (**s4 EA 2010**):

- age (**s5**);
- disability (**s6**);
- gender reassignment (**s7**);
- marriage and civil partnership (**s8**);
- pregnancy and maternity (**s18**);
- race (**s9**);
- religion or belief (**s10**);
- sex (**s11**); and
- sexual orientation (**s12**).

2.3.1 Age

Where **EA 2010** refers to the protected characteristic of age, it means a person belonging to a particular age group. An age group includes people of the same age and people of a particular range of ages.

2.3.2 Disability

A person has a disability if:

- (a) they have a physical or mental impairment; and
- (b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (**s6**).

2.3.2.1 A physical or mental impairment

Specific exclusions (set out in the **Equality Act 2010 (Disability) Regulations 2010**) are socially unacceptable tendencies – for example, pyromania, kleptomania, a tendency to physical or sexual abuse of other persons, exhibitionism, voyeurism, tattooing and body piercing, drug addiction or alcoholism or addiction to smoking; also excluded are hay fever and needing glasses. This has not yet generated much litigation, but alcoholism as a cause of other illness will do so. It was held by the EAT in **Power v Panasonic UK Ltd [2003]** that an alcoholic who was suffering from depression was disabled (even though the depression might have been due to her alcoholism, and addiction to alcohol is expressly excluded from the statutory definition of disability). It will

therefore be important for employers to distinguish between the addiction and the illnesses or disabilities that arise from that addiction. The latter might fall into the definition of disability although the former does not.

Kaltoft v Municipality of Billund [2013] demonstrates the need for care by employers to avoid discrimination. In this case, the European Court of Justice (ECJ) held that there is no general principle of EU law which prohibits discrimination on the ground of obesity but the ECJ recognised that there are conditions under which obesity can amount to a disability. The ECJ ruled that there could be a disability if the obesity *“entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers”*. This might be the case, for example, where an employee’s obesity results in restricted mobility or the onset of related medical conditions.

EA 2010 specifically includes certain illnesses and conditions within the remit of the legislation. These include HIV, cancer and multiple sclerosis.

In addition to things which actually stop people doing things, severe disfigurement is also categorised as impairment, even if it does not affect a person’s day-to-day activities.

Hay fever is not a disability unless it exacerbates another condition, nor are voluntary “disfigurements” such as tattoos and body piercing.

2.3.2.2 Substantial

“Substantial” has a surprisingly limited definition meaning more than “minor” or “trivial”. In **Paterson v Metropolitan Police Commissioner [2007]** the EAT held that the task of the tribunal was not to compare the performance of the employee with that of the average person in the population. Rather, it was the comparison between what the individual could do and what they would be able to do without the impairment. The effect is “substantial” if that difference is greater than the kind of difference you would expect if you applied the same test to a cross-section of the population.

2.3.2.3 Long-term effect

The effect of an impairment is long-term if:

- it has lasted or is likely to last for at least 12 months; or
- it is likely to last for the rest of that person’s life.

Recurrent problems are treated as having a long-term effect if they start off having a substantial effect and are likely to recur. There is no limit on the time-scale for recurrence. So, if a person has one epileptic fit, but further fits are likely, that person is treated as disabled from the date of the first fit.

Progressive conditions (conditions that are likely to get worse over time) that are likely to have a substantial effect on a person’s ability to carry out normal day-to-day activities in the future are deemed to be disabilities from the point at which the condition has some effect on the person’s abilities.

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